(1)

88-1257

No.

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEAN KERTESZ,

Petitioner,

vs.

UNIVERSITY OF SOUTHERN CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WAS IT ERROR FOR THE CALIFORNIA TRIAL COURT TO DENY THE MOTION TO SET ASIDE THE DISMISSAL OF THE ACTION WHERE PETITIONER PREVIOUSLY HAD NOT BEEN GIVEN PROPER NOTICE OF SUCH PROPOSED DISMISSAL?
2. DID THE COURT OF APPEAL AND THE SUPREME COURT OF THE STATE OF CALIFORNIA FAIL TO TAKE INTO ACCOUNT THE GUARANTEE OF DUE PROCESS OF LAW, WHICH REQUIRES NOTICE AND A FAIR HEARING?
3. CAN THE COURTS OF A STATE FIX A TIME LIMIT TO CORRECT A VOID JUDGMENT UPON MOTION OR DIRECT APPEAL?

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*/ ALL PARTIES ARE LISTED IN THE CAPTION.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JEAN KERTESZ,

Petitioner,

vs.

UNIVERSITY OF SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

STATE OF CALIFORNIA

Petitioner, JEAN KERTESZ, petitions this Court for a Writ of Certiorari to review the Order of the Supreme Court of California denying review after Judgment and Opinion of the Court of Appeal, Second District, rendered in this action.

OPINIONS BELOW

The Order Denying Review by the Supreme Court, State of California, is attached hereto as Appendix "A". The Opinion of the Court of Appeal, Second District affirming the Order of Dismissal of the Superior Court of Los Angeles County, is attached hereto in Appendix "B". The Order of the Superior Court for Los Angeles County dismissing Petitioner's action on its own motion for lack of prosecution is attached hereto as Appendix "C".

JURISDICTION

The Order of the Supreme Court, State of California, denying review after Opinion by the Court of Appeal was filed on October 26, 1988. The Court of Appeal had affirmed the Order of the Superior Court of Los Angeles County which denied

Petitioner's Motion to Set Aside a Void Judgment made without proper notice to Petitioner and thereby depriving Petitioner of her due process rights guaranteed in the Fourteenth Amendment of the United States Constitution. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1257(B).

STATUTORY PROVISIONS INVOLVED

The following are listed pursuant to Supreme Court Rule 21 subd. 1(x), and are set forth in detail in Appendix "D"

1. United States Constitution Fourteenth Amendment.

The following are set forth in the text of the Statement of the Case or in the Reasons for Granting the Writ.

1. California Code of Civil Procedure Section 583.420(a).

STATEMENT OF THE CASE

Petitioner had been an Assistant Research Professor in the University of Southern California School of Pharmacy (herein USC). This was her final position while being employed at the University for a total of 17 years from September, 1963 through August, 1980. She had received a PhD in Pharmaceutical Chemistry in January, 1970, while working at USC since 1963 as a teaching and research assistant and research associate. She continued in her employment as a research associate in the U.S.C. School of Pharmacy for the next 7 years engaged in a diverse research program in pharmaceutical and biomedicinal chemistry.

On July 25, 1977, she was promoted to the position of assistant research

professor in the USC School of Pharmacy which promotion was to a full-time, non-tenured faculty position which she held through August, 1980, when she was summarily removed from her laboratory.

Certain disagreements arose between Petitioner and the USC Administration in connection with the terms of employment, salary and working conditions associated with her position. These disagreements resulted in her being summarily dispossessed of her work space and research facilities and of being locked out of the School of Pharmacy sometime in August, 1980.

Commencing on or about 1979, Petitioner pursued administrative remedies for her grievances in accordance with established USC grievance procedures. At the time that she was locked out from her work

space at the University, to wit, August, 1980, she was unable to complete a final judicial phase of the USC Grievance Procedures. When Petitioner had received her appointment in 1977, from the Dean of the School of Pharmacy, she was promoted to the position of Assistant Research Professor, which appointment carried with it the status of a "special, non-tenured, full-time faculty member".

Petitioner had the right of a non-tenured faculty member to written advance notice of discharge in accordance with the provisions of the Faculty Handbook. Petitioner was entitled to 12 months written advance notice from USC to effect a valid discharge in accordance with said Handbook. In accordance with the Handbooks applicable during the period of her employment, a letter of termination

should have been given to Petitioner at least 12 months in advance. Where there has been a condition of continuous employment, as in Appellant's case, that faculty member is entitled to his or her salary for at least a year from the date of Notification of Dismissal whether or not he or she is continued in the duties at the institution. All of these vested procedural and substantive rights were denied her by USC. Appellant did not receive from any appropriate person or authority at USC a Notice of Non-Reappointment as required. At no time did Appellant receive notice of non-renewal of her contract. A small part of her back salary was paid during April of 1978 but other than that, Appellant received no salary from November, 1977 through August, 1980, from USC. Since no

notice of termination or any actual University termination papers were ever given to or processed by Petitioner at any time, there has never been any actual closure of her employment or any proper documentation thereof.

On October 26, 1981, Petitioner filed the instant action against Respondent USC alleging breach of contract, fraud, negligent and intentional infliction of emotional distress, and discrimination against her by the University. Proof of service of the Summons and Complaint was served upon the Respondent USC on October 26, 1984. Respondent USC filed an answer to the complaint on December 5, 1984.

Unbeknownst to Petitioner an order of dismissal was entered by the Superior Court on October 3, 1985, pursuant to a Notice of Intention to Dismiss on the

Court's own motion. The Notice and Motion of Intention to Dismiss on the Court's own Motion was made on August 2, 1985 in the form of an Order to Show Cause why the court should not on its own motion enter its order dismissing said action for lack of prosecution pursuant to Section 583.420(a) Code of Civil Procedure. C.C.P. Section 583.420(a) provides in pertinent part:

> "(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion . . . "

The notice and the order contain the language that in the event no written opposition was filed within fifteen (15) days after service of the notice pursuant to Rule 203.5 California Rules of Court, the court ordered that mailing of the notice of intention to counsel of record

to the most recent address of record contained in the court file would constitute notice of filing Order of Dismissal. The order reads as follows:

> "In the event no written opposition is filed within 15 days after service of this notice pursuant to Rule 203.5 California Rules of Court, it is further ordered that mailing of this Notice of Intention to counsel of record or parties in propria persona to the most recent address of record as contained in the court file will constitute Notice of Filing of Order of Dismissal." (Appendix C) (Emphasis Added.)

The notice was sent to Petitioner's then counsel, Albert Cary Plotkins, at the address of 2029 Century Park East, Suite 1800, Los Angeles, California, 90067. The notice to the attorney Albert Cary Plotkins was mailed on August 2, 1985, by Frank S. Zolin, County Clerk. The envelope containing the notice of the intent to dismiss was returned to the

County Clerk shortly thereafter, namely, August 6, 1985, with a notice "RETURN TO SENDER, NO FORWARDING ORDER ON FILE, UNABLE TO FORWARD."

On October 3, 1985, the Superior Court dismissed the action with a simple minute entry denoting the action was dismissed (Appendix "C"). At the time that the Notice of Intention to Dismiss was forwarded to Petitioner's attorney, he was not officing at the address to which the notice was mailed. The Clerk's own file showed clearly that the last known address in the clerk's file of said attorney, as contained in the Proof of Service of the Complaint upon Defendant USC filed on October 26, 1984, was 8484 Wilshire Boulevard, Suite 220, Beverly Hills, California, 90211, with phone (213) 852-7155.

Petitioner did not learn or discover the dismissal of the action until early October, 1986. At that time, she had consulted a new attorney because of lack of any communication with her then attorney of record. She was advised by the new attorney to examine the court file and upon examining the court file, discovered that the case had been dismissed a year earlier without any notice to her or her then attorney of record. Petitioner then filed, through her new attorney, a Notice of Motion to Set Aside Dismissal of the action which the trial court denied. The court made a finding that proper notice of the hearing had been given. Under the statute it was the duty of the Trial Court to examine the court file and determine if notice was properly given.

The Court's file would have disclosed the lack of due notice and the court would have set aside the dismissal on its own motion. Instead the motion to set aside was summarily denied by the trial court. This was a fundamental error of the Trial Court since Constitutional errors are fundamental issue.

Petitioner then retained her present counsel to file an appeal from the Denial of the Motion to Set Aside the Judgment of Dismissal.

Petitioner raised the fundamental issue of the denial of her constitutional right to notice and an opportunity to be heard that had resulted in the said void order of dismissal by the Superior Court in her appeal before the California Court of Appeal. Petitioner also raised the issue in her appellate brief before the Court

of Appeal that a judgment void on its face may be collaterally attacked at any time upon discovery. Petitioner pointed out to the Court of Appeal that the rule permitting collateral attack on a void judgment is particularly applicable to cases in which the record discloses that the order was made in excess of the Court's jurisdiction where there was no proper notice and an opportunity to be heard. Petitioner noted the following California cases to the Appellate Court:

Baird v. Smith (1932) 216 Cal. 408, 410, 14 P.2d 479. Baird concerned a case involving a clerk's unauthorized entry of default judgment.

Estate of Buckley (1982) 132 CA 2d 434, 450, 183 Cal. Rptr. 281, wherein the Court found that the issuance of Letters of Administration without Appellant's

having published notice or having filed affidavit required by Probate Court Section 333 was subject to collateral attack.

Estate of Joslyn (1967) 256 Cal. App. 671, 676, 64 Cal. Rptr. 386, wherein the Court found that the appointment of a Trustee could be set aside because of a failure to file petition and post notice under Probate Code Section 1200.

Witkin, California Procedure, Third Edition, U.S. (1986) Attack on Judgment in Trial Court at page 414:

> "A judgment 'void on its face' may be collaterally attacked. This is another way of saying that the presumption of jurisdiction is overcome when the defects may be shown without going outside the 'record' or judgment roll, including the pleadings, proof of service, findings or verdict, and judgment."

A Court which rendered a void judgment may act on its own motion to vacate or

set it aside where the judgment is void on its face. As said in Michel V. Williams (1936) 13 CA 2d 198, 199, 56 P. 2d 474, the Court has power to vacate an order void upon its face at any time upon its own motion or upon motion of a party.

Petitioner argued in vain before the Court of Appeal that she had important substantive and procedural rights under her employment contract which were denied her by Respondent USC and that these grievances were set forth in the instant action. The action was then summarily dismissed by the Superior Court in 1985 without giving her notice or the opportunity to present evidence, all in violation of her due process rights under the Fourteenth Amendment.

The Court of Appeal in its Opinion affirmed the Order of Dismissal (Appendix

B).

Petitioner then filed a Petition for Review before the Supreme Court of the State of California in which she reiterated her argument that the Opinion of the Court of Appeal affirmed a void judgment of the Trial Court which had deprived Petitioner of her fundamental due process right to notice and an opportunity to present evidence as guaranteed her under the Fourteenth Amendment to the United States Constitution. The Supreme Court of the State of California denied her a review. (Appendix A).

REASONS FOR GRANTING THE WRIT

I

IT WAS ERROR FOR THE CALIFORNIA TRIAL COURT TO DENY THE MOTION TO SET ASIDE ITS OWN JUDGMENT OF DISMISSAL OF THE ACTION WHERE THE LACK OF NOTICE OF THE HEARING TO PETITIONER'S COUNSEL WAS APPARENT ON THE FACE OF THE RECORD.

The trial court in this case issued a patently void order where it elected to dismiss the case on its own motion and faiLed to note that the basic safeguards of procedural due process afforded Petitioner had not been met by the clerk of the Court since there was no proof of service as required by the statute C.C.P. Section 583.420(a). When Petitioner filed her motion to set aside the void order before the same court, the error of lack of due notice which the Fourteenth

Amendment affords any litigant in any court in the United States was again ignored and, compounding the detriment to petitioner, the trial court made a specific finding that notice was properly given. Said the Trial Court in refusing to grant petitioner relief (Excerpt Reporters Transcript) (Appendix E):

> "We dismiss about 200 cases a week in this court, cases that have been abandoned on our own motion.
>
> The notice is properly given. We give it a 45-day notice.
>
> The notice indicates the court will dismiss. Cases have upheld that notice on the grounds that it does comply with California Rules of Court 373.
>
> We regularly set them aside, if counsel move promptly, because it's

just a device we use to get rid of the dead wood, but once the six months has run it's no longer an administrative function.

Then it's a matter addressed to the discretion of the court, and this just doesn't get there."/[1]

Petitioner strongly contends, as she did before the California Appellate Courts, that any application of state time-limits are inapplicable to void judgments involving issues of constitutional violations. If this contention is true, the judgments of

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1/ Rule of Court 373, similar in substance, replaced Rule 203.5 California Rules of Court effective January 1, 1984. The form used by the Trial Court in the instant case, although filed on August 2, 1985 was the "old" printed form which referred to Rule 203.5. See Excerpt Reporter's transcript Appeal, Appendix E.

the Trial Court, the Court of Appeal and the Supreme Court of California in this case are all erroneous. The error becomes strikingly obvious when the Trial Court itself initiates the wrongful denial of Constitutional rights to the severe detriment of a litigant. Thus, it is state action which deprived petitioner of her due process rights guaranteed in the Fourteenth Amendment and this Honorable Court is the only court to which she may address her grievance. The plight of Petitioner can very well be the plight of many citizens in other jurisdictions who may, likewise, become victims of a careless state regard for constitutional rights of its citizens. In Allen v. United States (1952 DC ND Ill) 102 FSup 866, the defendant was convicted and sentenced to prison in 1933

and then conditionally released in 1942. After being in an out of prison for various reasons, while in custody in 1950 a warrant was served on him for violation of probation on the 1933 charge, for which he was again incarcerated. At this time, being some 19 years later, defendant petitioned the Federal court to set aside the original conviction on the basis of denial of right to assistance of counsel under the 6th Amendment. The court ordered an evidentiary hearing and required the production of defendant therefor. It was discovered that the court record was completely silent as to whether or not the defendant had waived his right to counsel. The court held that compliance with the 6th Amendment constitutional mandate is an essential jurisdictional prerequisite to a federal

court's authority to deprive an accused of his life and liberty. The Allen court stated with respect to due diligence:

> " . . . As to the government's remaining contention, i.e. that Allen did not assert his constitutional right with due diligence and, therefore, is not entitled to relief, the court is unable to perceive its applicability. A void judgment is as void today as it was twenty years ago [Emphasis ours] No aging process, whereby a void judgment improves as to stature and validity by the passage of time, can properly be imposed . . . "

It is the contention of Petitioner that where constitutional issues are material to a judgment of dismissal of an action based upon the premise that the judgment is void, then time stands still and the passage of time does not close the door to its consideration. The California Appellate Courts did not deem the Dismissal of Petitioner's case by the Trial Court as violative of

constitutional rights notwithstanding the lack of notice and opportunity to be heard.

II

THE CALIFORNIA COURTS REFUSED TO PROPERLY REVIEW THE CONSTITUTIONAL REQUIREMENTS OF PROCEDURAL DUE PROCESS FOR A FAIR HEARING AND THIS CONSTITUTES IMPERMISSIBLE STATE ACTION PROHIBITED BY THE FOURTEENTH AMENDMENT.

The basic question here is whether the action of California Courts (in the first instance the Superior Court of Los Angeles County acting through its Clerk, and in later instances acting through its appellate tribunals -- in all instances State action) deprived Petitioner of her due process rights guaranteed in the Fourteenth Amendment.

Her constitutional rights depend on the

meaning given to the Due Process clause of the Fourteenth Amendment.

In particular the action of California Courts has prevented Petitioner from relying on the due process right of being advised of the status of pending judicial proceedings, namely, failure by the state to give adequate notice and to assure opportunity to present legal claims. Further, this circumstance prevented Petitioner from having the effective assistance of counsel.

The Due Process Clause of the Fourteenth Amendment applies to substantive and procedural rights. A state may not engage in judicial proceedings which are procedurally unfair.

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and

> opportunity to defend, has, of course, long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment."

Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948).

The guarantees of the Sixth Amendment right to counsel also has become a limitation on the activities of the state judiciary in criminal trials. Such right has been termed "a fundamental right, essential to a fair trial." The Sixth Amendment has been rendered applicable to State Judicial Action through the Due Process clause of the Fourteenth Amendment.

Gideon v. Wainright, 372 U.S. 335 (1963);

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Due process of law carries with it the guarantee of prior notice before the government may deprive someone of a protected property interest. Brock v. Roadway Express (1987) 481 U.S. ____, 95 L. Ed. 2d 239, 107 S. Ct. ____. The notice must be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Co. (1953) 339 U.S. 306, 314. Notice that is sent to a superseded address and returned to the clerk of the Trial Court undelivered is not reasonably calculated to reach a party.

CONCLUSION

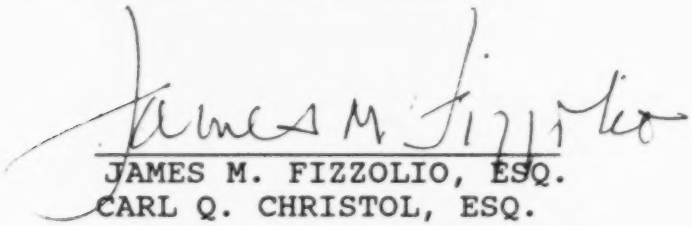
Based upon the above, Petitioner makes the urgent plea for the attention and assistance of this court in order to have her case reinstated so that it may be tried on its merits at last. The California Courts have refused to rule on fundamental Constitutional deprivation issues raised in her appeals. Petitioner had filed an action against the University of Southern California, her former employer, and has been subjected to an unwarranted dismissal of her action on the Trial Court's own motion without adequate notice of the hearing and without any opportunity to defend herself.

Petitioner respectfully urges the Court to grant this Petition for Certiorari and thereby afford her the protection of her

due process rights guaranteed her under the Fourteenth Amendment which was enacted for all people of each of the states.

Dated: January 19, 1989

RESPECTFULLY SUBMITTED:



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APPENDIX "A"

Supreme Court
Filed
October 26, 1988
Clerk

_____
Deputy

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Div. 2, No. B026013
S007160

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

KERTESZ

v.

UNIVERSITY OF SOUTHERN CALIFORNIA, et al.

Appellant's petition for review DENIED.

S/Malcolm Lucas
Chief Justice

APPENDIX "B"

NOT FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 2

JEAN KERTESZ, Plaintiff and Appellant, vs. UNIVERSITY OF SOUTHERN CALIFORNIA, et al., Defendants and Respondents.	FILED No. B026013 (Sup. Ct. No. C387432) COURT OF APPEAL SECOND DIST. FILED AUG 4-1988 ROBERT N. WILSON, CLERK Deputy Clerk

APPEAL from an order of the Superior Court of Los Angels County. Donald W. Pike, Judge. Affirmed.

Fizzolio, Fizzolio & McLeod and James M. Fizzolio for Plaintiff and Appellant.

William P. Hogoboom and Richard L. Hutchinson for Defendant and Respondent.

Plaintiff Jean Kertesz appeals from the denial of her motion to set aside a judgment of dismissal for lack of prosecution entered pursuant to Code of Civil Procedure Section 583.420, subdivision (a)(2)(A).[1] We affirm.

---

1. Code of Civil Procedure Section 583.420 provides in pertinent part:

"(a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred: . . .

"(2) The action is not brought to trial within the following times:

"(A) Three years after the action is commenced against the defendant unless otherwise prescribed by rule under subparagraph (B)."

The foregoing section should be read in conjunction with the Code of Civil Procedure section 583.410, subdivision (a), which states: "The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

The relevant facts may be briefly summarized as follows. Plaintiff was hired by the University of Southern California (USC) in March 1977, as a non-tenured assistant research professor. When a dispute arose between the parties some two years later, plaintiff initiated grievance procedures pursuant to university regulations. In 1980, while the administrative process continued, she sought a preliminary injunction requesting that USC be restrained from interfering with her employment. Following denial of the injunction in July, 1980, plaintiff was discharged from her position. She thereafter dismissed her action for injunctive relief.

On October 26, 1981, plaintiff instituted the instant lawsuit against USC seeking damages for fraud, breach of

contract, discrimination and intentional infliction of emotional distress. The complaint itself was filed by her then attorney of record, Albert Cary Plotkins, whose address appeared on the first page of the pleading as "2029 Century Park East, Suite 1800, Los Angeles, California, 90067." That document, however, was not served until October, 1984. The proof of service filed with the court indicated Plotkins' address as "8484 Wilshire Blvd., Suite #220, Beverly Hills, California, 90211."

Following the filing of USC's answer in December 1984, the case remained dormant until August 1985, when the superior court notified the parties by mail of its intention to dismiss the case on its own motion pursuant to section 583.420, subdivision (a)(2)(A). The notice itself stated in pertinent part that "[i]n the

event no written opposition is filed within 15 days after service of this notice pursuant to Rule 203.5 California Rules of Court [now see Rule 373], it is further ordered that mailing of this Notice of Intention to counsel of record . . . to the most recent address of record as contained in the court file will constitute Notice of Filing of Order of Dismissal. . . ."

Plaintiff's copy of the notice was mailed by the clerk of the court to Plotkins' Century City address as it appeared on the complaint. The envelope was returned unopened several days later bearing the legend: "Return to sender. No forwarding order on file. Unable to forward." The clerk, however, made no further attempt to serve the notice, and the action was dismissed for lack of prosecution on October 3, 1985.

Plaintiff did not learn of the dismissal until one year later, in October 1986, when, pursuant to her newly retained counsel's instructions, she examined the court file. The following month, November 1986, plaintiff, through counsel, filed a motion to set aside the judgment of dismissal on equitable grounds. Her declaration attached to the motion essentially averred that she had been abandoned by Plotkins for lack of funds and that his negligence was the cause of the dismissal./[2] USC, of course, opposed reinstatement of the

---

2. Plaintiff's declaration stated in pertinent part:

"(8) From the start of our relationship, Plotkins made it clear that I was not to 'bother' him (i.e., contact him) unless I had money to pay him for his continuing services, and I was always financially strapped. According [sic] I contacted him infrequently. In October, 1983 I called Plotkins for advice as to the status of our legal efforts. . . . [He] complained about his need for money

action, arguing that it had been severely

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2. (cont.) in order to work on the litigation, but he insisted that there were no urgent needs in connection with moving the litigation forward. . . .

"(11) In March, 1985, I called Plotkins' office several times, but was not put through to him. I left messages for him to return my calls, but he did not.

"(12) In early February, 1985, without my knowledge or authorization, Plotkins negotiated a proposed settlement of the lawsuit. I first learned of that proposal when Plotkins mailed it to me on June, 6, 1985 along with a statement for those 'services' . . . . I did not accept the proposal . . . .

"(14) [F]or a long period of time I was without any money to pay to move the litigation forward. I had been emotionally and financially drained by the dispute with USC, but I did have an expectation of money coming from the estate of my mother, who had died on October 20, 1984. My depression and poverty were compounded when I was assaulted and beaten on the street in Los Angeles on March 3, 1986 by two men who stole my purse. Following that incident much of my attention was directed to the criminal processes involving the prosecution of my assailants.

"(15) The money from my mother's estate finally came on October 6, 1986. For the first time I had a significant sum of money to apply to attorneys [sic] fees for this litigation. I soon retained my present attorney . . ."

prejudiced by the protracted delay in the prosecution of the case. The trial court denied the motion and this appeal follows.

While continuing to assert that Plotkins acted negligently in failing to notify the clerk of the court of his change of address pursuant to rule 385 of the California Rules of Court,[3] plaintiff further argues that the clerk's mailing of the notice of intention to dismiss was defective in the first instance because of lack of compliance with Code of Civil Procedure section 1013, subdivision (a). That section provides that the mailing of a notice is complete when it is posted in an envelope

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3. Rule 385 provides: "A party or attorney whose address changes while an action is pending shall serve on all parties and file written notice of the change of address."

"addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence." (Emphasis added.) "This subdivision is applicable to the mailing by a court clerk of notice announcing the entry of an appealable judgment or order. [Citation]" (Triumph Precision Products, Inc. v. Insurance Co. of North America (1979) 91 Cal.App.3d 362, 365.)

Although the record discloses that the superior court clerk did not mail notice of the impending dismissal to Plotkins' most recent address as it appeared on the proof of service, we need not consider

the effect of that omission because of plaintiff's lack of diligence in bringing

the case to trial within five years of the filing of the complaint (Code Civ. Proc., Section 583.310). Section 583.360 requires that an action not brought to trial within that time be dismissed, subject only to extension, excuse or exception provided by statute./4 In our case, the statutory period expired on October 26, 1986, some three weeks before plaintiff filed her motion to set aside the judgment of dismissal. Absent some showing that it was impossible, impracticable or futile to bring the matter to trial within five years (see

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4./ Section 583.360 provides:

"(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

"(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

Code Civ. Proc., Section 583.340, subd. (c)), the trial court would have been under a mandatory duty to dismiss the complaint on that date in any event. Thus, even if we were to reverse the order denying plaintiff's motion to set aside the dismissal, which we do not, USC would be entitled to move for a mandatory dismissal under section 583.360 upon remand. The law does not, of course, require idle acts. (Civ. Code Sec. 3532).

Here, there is little to indicate that plaintiff took any affirmative action to move the case forward from the time the suit was filed in 1981. Service of the complaint was inexplicably delayed for three years, discovery was not conducted, and no at-issue memorandum was filed. The fact that the parties may have been engaged in settlement negotiations in February 1985, does not excuse nearly

four years of inactivity. Neither does plaintiff's alleged financial difficulties or other personal problems unrelated to this litigation. Lacking knowledge of the dismissal in October 1985, plaintiff had all the more reason to take some action that would have served to move the litigation closer to trial during the last year of the five-year period. Needless to say, no such action occurred. If it had, plaintiff undoubtedly would have discovered that the case had been dismissed. The fact that she did not only underscores the lack of reasonable diligence displayed by her throughout these proceedings.

Plaintiff nevertheless argues that she should not be held accountable for her counsel's negligence, and that any delays in the prosecution of this lawsuit must be attributed to his ineffective

representation. As we recently noted in (Minkin v. Levander (1986) 186 Cal.App.3d 64, 72, ". . . [T]he cases are all too frequent where laymen are foreclosed from their day in court by the actions of their counsel in whom they have placed their trust. The law, however, must impute the actions of the attorney to the client who retained him unless his neglect was so inexcusable and extreme as to constitute positive misconduct. [Citation.]" The term "positive misconduct" refers to acts and/or omissions on the part of the trial counsel which result in the abandonment of the client or otherwise "'obliterate[] the existence of the attorney-client relationship.'" (Caroll v. Abbott Laboratories, Inc. (1982) 32 Cal.3d 892, 898, emphasis omitted.)

In this context, Daley v. County of

Butte (1964) 227 Cal.App.2d 380, appears to have become the standard by which each case of neglect by an attorney is tested. In that case, the attorney held up a substitution of attorneys, failed to serve process, failed to appear at pretrial conferences , and failed to communicate with his client, the court and opposing counsel. The facts of the instant case do not remotely resemble Daley. (See also Orange Empire Nat. Bank v. Kirk (1968) 259 Cal.App.2d 347.) While Plotkins may have failed in his duty "to keep track of the calendar and the pertinent dates which are crucial to maintenance of [the] lawsuit" Minkin v. Levander, supra, 186 Cal. App.3d 64, 69), he did not abandon his client. The record and plaintiff's own declaration reveal quite the opposite.

Counsel apparently negotiated with USC

during several months in the spring of 1985, and reached a settlement that plaintiff now claims was unacceptable. Plotkins last communicated with plaintiff on October 21, 1985, when he wrote: "I have not heard from you for some time. Please respond to my communication concerning the settlement proposal. I would deeply appreciate the courtesy of a reply from you inasmuch as although you are representing yourself as to the complaint, I contacted opposing counsel and worked out a proposed settlement." Although plaintiff admits receiving the letter, she concedes that she did not contact Plotkins as he requested because of her inability to pay his fees. (See fn. 2, supra.) Contrary to the argument advanced here, we can find nothing in the record to support the claim that counsel threatened to abandon his client because

of her financial difficulties. In any event, plaintiff's refusal to discuss the matter with Plotkins or to seek other legal advice materially contributed to the delay in the prosecution of the case.

On the basis of the record before us we cannot conclude that counsel's acts and/or omissions were tantamount to positive misconduct entitling plaintiff to any relief in this case. While it may be true that defendant USC made no specific showing of prejudice in response to the motion to set aside the dismissal, that omission does not aid plaintiff's cause. As observed by the Supreme Court in Carroll v. Abbott Laboratories, Inc., supra, 32 Cal.3d 892, 900-901, "We have . . . found no case which permits the setting aside of a judgment in spite of [counsel's] inexcusable neglect, simply because the other side has not been

prejudiced. [Citations.]"

Based upon the foregoing, the trial court did not abuse its discretion when it denied plaintiff's motion to set aside the judgment of dismissal.

The order appealed from is affirmed.

NOT FOR PUBLICATION.

S/Compton , Acting P.J.
COMPTON

We concur::

S/Gates , J.
GATES

S/FUKOTO , J.
FUKUTO

APPENDIX "C"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Date: 10/3/85 DEPT. 1

HONORABLE JACK E. GOERTZEN, JUDGE
R. RAY, DEPUTY SHERIFF

A J ANTENORCRUZ, DEPUTY CLERK
Y. ENGHOLN, REPORTER

NATURE OF PROCEEDINGS: NOTICE OF INTENTION TO DISMISS ON COURT'S OWN MOTION

Please take notice that on October 3, 1985, at 1:30 p.m., a hearing will be held on the following listed cases before the above-entitled court in Department 1 located in 111 North Hill Street, Los Angeles, California, where cause, if any, shall be shown why the Court should not on its own motion enter its Order dismissing said actions for lack of prosecution pursuant to Section 583.420(a) Code of Civil Procedure.

Case No.	TITLE
60. C 387432	JEAN KERTESZ CIVIL-MI VS. UNIVERSITY OF SOUTHERN CALIFORNIA

[OMITTED TEXT NOT RELEVANT TO THIS CASE]

In the event no written opposition is filed within 15 days after service of this notice pursuant to Rule 203.5 California Rules of Court, it is further ordered that mailing of this Notice of Intention to counsel of record or parties in propria persona to the most recent address of record as contained in the court file will constitute Notice of Filing of Order of Dismissal. Copies of this notice of Intention are sent to all counsel or parties in propria persona by U.S. mail this date.

Dated: 20/3/85 S/Jack E. Goertzen

Judge

ORDER OF DISMISSAL

There being no written opposition filed after service by U.S. Mail of the above notice, the foregoing listed cases are dismissed pursuant to Section 583.420(A) of the Code of Civil Procedure:

Dated: October 3, 1985

S/Jack E. Goertzen
JUDGE
Dept. 1 Minutes Entered
October 3, 1985
County Clerk

Minute Order

VOID
10-3-85
L.E.

CERTIFICATE OF MAILING

I, FRANK S. ZOLIN, County Clerk and Clerk of the Superior Court of California, County of Los Angeles, and not a party to the within action certify that on August 2, 1985, I mailed a true copy of the reverse notice to each party or his attorney of record addressed as listed below by placing the copy in a sealed envelope with postage prepared and depositing in the U.S. Post Office at Los Angeles, California.

Dated: August 2, 1985

FRANK S. ZOLIN, County Clerk and Clerk of the Superior Court of California, County of Los Angeles

9745467

by: Thucuc Nguyen
Deputy

60. Albert Cary Plotkins
2029 Century Park East, Ste. 1800
Los Angeles, CA 90067

Office of the General Counsel
University of Southern California
University Park - ADM 353
Los Angeles, CA 90089-5013

[OMITTED TEXT NOT RELEVANT TO CASE]

APPENDIX "D"

U.S. CONSTITUTION, AMENDMENT 14

SECTION 1. CITIZENS OF THE UNITED STATES.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

CODE OF CIVIL PROCEDURE

Section 583.410. Discretion to dismiss under appropriate circumstances; procedure

(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by the rules adopted by the Judicial Counsel. Added by Stats. 1984, c. 1705, Section 5.).

APPENDIX "E"

EXCERPT FROM REPORTER'S TRANSCRIPT

ON APPEAL

Kertesz vs. Univ. of Southern California
Case No. B026013

"In October something else happened. It's just not the kind of case which the court ought to intervene in.

We dismiss about 200 cases a week in this court, cases that have been abandoned on our own motion.

The notice is properly given. We give it 45 day notice.

The notice indicates the court will dismiss. Cases have upheld that notice on the grounds that it does comply with California Rules of Court 373.

We regularly set them aside, if counsel move promptly, because it's just a device we use to get rid of the dead wood, but once the six months has run it's no

longer an administrative function.

Then it's a matter addressed to the discretion of the court, and this just doesn't get there." (Reporter's Transcript Page 3, Line 24 to Page 4, Line 10).